

<https://helda.helsinki.fi>

Reshaping Markets : Economic Governance, the Global Financial Crisis and Liberal Utopia

Zhang, Kangle

2018-02-13

Zhang , K 2018 , ' Reshaping Markets : Economic Governance, the Global Financial Crisis and Liberal Utopia ' , Social & Legal Studies , vol. 27 , no. 1 , pp. 124-127 .

<http://hdl.handle.net/10138/233277>

acceptedVersion

Downloaded from Helda, University of Helsinki institutional repository.

This is an electronic reprint of the original article.

This reprint may differ from the original in pagination and typographic detail.

Please cite the original version.

BERTRAM LOMFELD, ALESSANDRO SOMMA AND PEER ZUMBANSEN (eds), *Reshaping Markets: Economic Governance, the Global Financial Crisis and Liberal Utopia*. Cambridge, United Kingdom: Cambridge University Press, 2016, pp. 388, ISBN 9781107095908, \$ 125.00.

Reshaping Markets seeks to explore “whether and, if so, how law shapes and reshapes markets and market behavior” (p. 347). Set against the background of the 2007-8 global financial crisis (GFC) and the regulatory changes in its aftermath, the editors notice a continuation of operations in market governance that led to the GFC, and consider “the absence of tangible change and transformation” a problem (p. 3). Dealing with this problem, this edited collection aims “to reveal and to deconstruct the normative background assumptions that are at work in market governance” by approaching “market as a legal construction” (p. 348). Socio-legal and historical investigations on various aspects of private law in this collection expose the normative conceptions underpinning the laws that construct the market. Those normative conceptions, as this volume shows, are about state, market actors, and their inter-relationship.

Each chapter in this collection deals with a particular aspect of economic governance, and gives a critical reflection on the existing regulations and/or regulatory changes after the GFC. While not all the chapters explicitly analyze the role of state in regulating markets, the reflections are essentially about the role of state in economic governance. To avoid being overly descriptive, the book review picks a few out of the 14 chapters and gives brief introductions. Based on the reflections provided in the chapters, the book review then formulates a critical assessment on the relationship between state and market actors.

David Campbell’s chapter demonstrates that the pre-GFC market governance based on the concept of deregulation, and the latter’s failure, do not imply that market allocation is not the best form of general economy. Campbell argues that state intervention is necessary in the establishment of the legal regulatory framework for market activities. James ‘Jay’ Varellas III’s chapter illustrates the role played by contract law in the development of securitization and the risk to financial system securitization entails. Varellas argues that the freedom of contract creates a space free from government interference, in this case a free zone for innovation of financial products. Putting this freedom in the context of the development of financial market that led to GFC, Varellas reflects on the progress and limits of State’s constraint of the freedom of contract for the protection of certain values.

Three of the chapters focused on debt. Iannis Michos’s chapter provides a critical narrative on the Greek crisis by sketching the socio-economic activities leading to the crisis starting from the year 1995. Michos takes the Greek crisis as an event instead of an accident, and analyzed the crisis using Foucault’s “tool box” (p. 99), giving a critical narrative on “the history of the event” as “history of our present” (p. 102). Alessandro Somma’s chapter argues that the contradiction between the austerity ideology which shapes citizens as subjectivity and the hedonistic morality in the center of consumer law reveals the “diverging moralities imposed on consumers” (p. 115). Moritz Renner and Andreas Leidinger in their chapter offer a history of the political economy of debt, and give a positive assessment of the contemporary political economy through the example of transnational derivative trading: “debt is about to be reembedded through a complex interaction of private standard setters and public enforcement authorities” (p. 154). Renner and Leidinger argue that the

authority of national state is unchallenged, despite the partial shift of authority to transnational private institutions.

Elsewhere, Larry Catá Backer's chapter introduces "the investing by sovereigns as a new element in emerging patterns of governance" (p. 229), and focused on the Norwegian Sovereign Wealth Fund (NSWF) after introducing China's practice of "aligning investment objectives to state policy" (p. 230). Maria Rosaria Ferrarese referred to Foucault's conception of market as a specific "regime of truth" (p. 321), and presents the "truth of the market" by scrutinizing how inconsistent the real world is with the narrative of the "free market".

In my view, this volume succeeds in reflecting on the premises of private law that construct market governance. It is a timely reflection, given the current unsatisfactory system of market regulations. The volume successfully collects articles that cover theoretical discussions on political economy, and offer legal analysis on contract and many other aspects of private law. I find, in particular, Campbell's theoretical discussion on political economy and regulatory theory interesting. Campbell takes Marx's economics as the "only true non-market concept of economic action" (p. 10), and uses the deficiency of the true non-market form of economy to evidence the superiority of market economy; then, Campbell explains the regulatory foundation by distinguishing social regulation from economic regulation, and points out the necessity of ex ante economic regulation, thus providing a rather comprehensive framework of economic governance. "The market economy is the best form of general economy" (p. 10), as David Campbell argues, and in such an economy, state intervention is necessary when it is limited to ex ante economic regulation.

That been said, the extent of reflection is limited by the fact that an editorial volume, while it skillfully covers a wide range of aspects of private law, lacks analysis pushing what is underlying in the chapters toward general normative claims. The difficulty of concluding with normative claims that the authors of the articles collected would agree on might also contribute to the lack of coherent normative claims. Bertram Lomfeld diagnoses, in the Epilogue, that "markets are a legal construction", "one of the central tasks of legal analysis must be to reveal and to deconstruct the normative background assumptions that are at work in market governance", and "however we succeed or fail in making alterations to existing legal institutions will have an impact on the future development of market functions" (p. 348). Such a diagnosis provides a conclusive framework to situate the argument of each chapter. However, it is a diagnosis without prescription, that it highlights the necessity of deconstructing without offering any deconstructive insight. The outline of the collection is structured by putting together chapters dealing with similar aspects of private law together, hence providing critical engagements with the normative premises of private law without pushing toward a coherent claim. The following part of the book review aims to abstract two points from the articles collected, and then deconstruct state's role in economic governance.

First, the contradiction between social norms and liberal economy, being regulated yet irreconcilable, is changing with the evolving of the contemporary era. The conflict is irreconcilable, as Haberl shows through the history of anti-discrimination law in Europe, that the conflict between liberty and equality is still there despite the court's ruling in favor of equality. Meanwhile, the conflict is changing, as Caruso shows with the discursive incompatibilities of American scholars' views on regulatory agenda in the US after GFC and on European contract law. Such a conflict informs private law's indeterminacy in regulation: different aspects of private law could have

different levels of protection regarding the same matters, and such practices vary in different contexts. This leads to the second point, that the state's role in economic governance diverges in different countries and regions in the world. The practices of Chinese sovereign wealth funds as Backer illustrates or state capitalism as Ferrarese argues, present a more complicated picture of the role of the state in economic governance globally.

The GFC exposed regulatory failures and informed this volume's approach to deconstruct the normative assumptions underpinning market governance. Taking the market as a legal construction enables a critical perspective on the role of the state in market economy (Lang, 2013). The reflections offered in the chapters of this book indicate the changing role of the state and market actors. For instance, Backer's chapter points out that through responsive investing, NSWF effectuates "public regulatory power through private financial markets" (p. 230). The changing role of the state is widely reflected in practices of sovereign investment globally (Backer, 2009). While the volume offers a set of examples of the changing role of states in various scenarios, it does not move one step further and challenge the normative assumption of private law which accepts the distinction between state and market actors. To reshape markets, this review argues, the distinction between state and market actors, as well as the law constituting such a distinction needs to be critically deconstructed (Kelman, 1990; Kenney, 1982): are state and market two distinct fields with distinct actors?

To critically deconstruct the distinction between state and market actors is not an easy task. States, eventually, hold regulatory authority; meanwhile, the language of the public/private distinction is so deeply embedded in not only the legal system but also our ways of thinking. That is not to say that such a critical effort is not possible. Description is a useful approach (Orford, 2012). The historical descriptions provided in this volume, for instance, offer an excellent method to revisit the distinction. Michos's historical account of the elements leading to the Greek crisis, Varellas's tracing of the contribution of contract law to securitization and the transformation of banks, Renner and Leidinger's elaboration on the three stages of the political economy of debt, and Haberl's historical sketch on the development of anti-discrimination law in Europe, all exemplify historical inquiry as a useful tool for critical analysis. Besides historical description, direct engagement with market activities is a necessary effort to link critical analysis with practice, so as to avoid the disconnection between critiques and practices. In this volume, Ferrarese uses the practices of shadow banking, of transnational corporations and competition, of state capitalism, and the strengthened role of the state in emerging countries after GFC to illustrate the "paradoxical mix of public/private created by global governance" (p. 331), and successfully connects critique with practices.

To deconstruct the state/market distinction might be a liberal utopia, but this volume offers ideas, hopes, and most importantly, an insightful collection of materials for critical engagement with the role and future of State in this world rife with political and economic uncertainties.

Kangle Zhang

University of Helsinki, Finland

Backer L (2009), Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience, *Transnational Law & Contemporary Problems* 19: 3-144 .

Kenney D (1982), The Stages of the Decline of the Public/Private distinction, *University of Pennsylvania Law Review* 130: 1349-1357.

Kelman M (1990) *A Guide to Critical Legal Studies*. Cambridge, Massachusetts and London: Harvard University Press.

Lang A (2013) The Legal Construction of Economic Rationalities, *Journal of Law and Society* 40: 155-171.

Orford A (2012), In Praise of Description, *Leiden Journal of International Law* 25: 609-625.